



## LEO WITTNER (ON RECONSIDERATION)

186 IBLA 30

Decided July 9, 2015



United States Department of the Interior  
Office of Hearings and Appeals  
Interior Board of Land Appeals  
801 N. Quincy St., Suite 300  
Arlington, VA 22203

LEO WITTNER (ON RECONSIDERATION)

IBLA 2014-235-1

Decided July 9, 2015

Motion for reconsideration from the Board's decision in *Leo Wittner*, 185 IBLA 329 (2015), reversing decisions of the California State Office, Bureau of Land Management, declaring unpatented mining claims forfeited and void by operation of law. CAMC208008, CAMC221064, and CAMC274199.

Reconsideration granted; *Leo Wittner*, 185 IBLA 329 (2015), vacated; BLM's decisions affirmed; BLM's motion for stay denied as moot.

1. Mining Claims: Rental or Claim Maintenance Fees: Small Miner Exemption--Rules of Practice: Appeals: Reconsideration

Where BLM declares unpatented mining claims forfeited and void by operation of law, stating that BLM did not receive the small miner waiver certification by September 1, and the administrative record forwarded to the Board does not contain the waiver certification or the envelope in which it was mailed, the Board will reverse the BLM decision. Where BLM seeks reconsideration of the Board opinion reversing BLM's decision, and presents the waiver certification and the envelope in which it was mailed to BLM, showing conclusively that the filing was untimely, the Board will vacate its decision and affirm the BLM decision declaring the claims forfeited and void.

APPEARANCES: Leo Wittner, Athol, Idaho, *pro se*; Debra Marsh, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

The California State Office, Bureau of Land Management (BLM), has filed a motion for reconsideration of the Board's decision in *Leo Wittner*, 185 IBLA 329

(2015),<sup>1</sup> in which we reversed BLM's decisions declaring three unpatented mining claims (CAMC208008, CAMC221064, and CAMC274199) forfeited and void by operation of law. BLM also requests a stay of the effectiveness of its decisions pending our review. With its motion for reconsideration, BLM has provided proof that Wittner's maintenance fee waiver certifications (Waiver Certifications) were not timely filed, and BLM has provided an explanation as to why this evidence of untimeliness was not part of the record on appeal during the Board's review. Wittner has not responded to BLM's pending motion. As discussed below, in light of these extraordinary circumstances, we grant BLM's motion for reconsideration and vacate our opinion. BLM's decisions declaring the mining claims forfeited and void by operation of law are affirmed. BLM's request for a stay is denied as moot.

### *Background*

Under our rules, the Board may reconsider its decision under "extraordinary circumstances." 43 C.F.R. § 4.403(b). A motion for reconsideration must: (1) specifically describe the extraordinary circumstances that warrant reconsideration; and (2) include all arguments and supporting documents. 43 C.F.R. § 4.403(c). Evidence that was not before the Board at the time the Board issued its decision and that demonstrates error in the decision constitutes grounds for granting reconsideration. 43 C.F.R. § 4.403(d). If the motion for reconsideration cites evidence that was not before the Board at the time of its decision, the movant must explain why the evidence was not provided to the Board during the course of the original appeal. 43 C.F.R. § 4.403(e).

BLM's decisions were premised on the ground that Wittner did not timely file his Waiver Certifications or pay the annual maintenance fees for the 2014 assessment year. *Leo Wittner*, 185 IBLA at 329-30. In its decisions, BLM stated that according to its records Wittner's Waiver Certifications were received in its office after the September 1, 2013, due date for the 2014 assessment year. *Id.* at 330. However, neither the envelope showing when Wittner transmitted the Waiver Certifications, nor the Waiver Certifications bearing BLM's date-stamp showing when they were received, were included in the record when the Board decided Wittner's appeal. *Id.* at 333. Absent those documents, we lacked the necessary evidence to determine when Wittner transmitted the Waiver Certifications to BLM, and absent the Waiver Certifications, we could not determine when BLM in fact received them. *Id.*

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<sup>1</sup> In this opinion, the Board decided three appeals docketed as IBLA 2014-235, 236, and 237. The Board docketed BLM's motion for reconsideration as IBLA 2014-235-1.

In its motion for reconsideration, BLM presents the Waiver Certifications showing they were received by BLM on October 21, 2013, and the envelope in which they were mailed was postmarked October 8, 2013. BLM explains that these documents were not included in the record forwarded to the Board upon receipt of Wittner's appeal because they were in the accounts department, being associated with an unrelated payment that was being partially refunded. BLM states: "Unfortunately, we did not know that the paperwork had not been included in the case file records until we received the Board's decision because the original documents were mistakenly filed in our copy or dummy files when the refund process was completed." With its motion for reconsideration, BLM included the refund documentation.

### *Analysis*

As required by 43 C.F.R. § 4.403(e), BLM has provided an explanation—inadvertent clerical error—for its failure to include the crucial evidence as part of the record it originally sent to the Board, *i.e.*, the postmarked mailing envelope and the Waiver Certifications with BLM's date-stamp showing the date of receipt.<sup>2</sup> We would remind BLM of its obligation to provide the Board with the complete, original administrative record, including all pertinent documentation involved in a matter on appeal. *See Shell Offshore, Inc.*, 116 IBLA 246, 249 (1990); *Dugan Production Corp.*, 103 IBLA 362, 364 (1988); *see also Dugan Production Corp. (On Reconsideration)*, 117 IBLA 153, 159-60 (1990) (Hughes, J., dissenting). Nonetheless, the documentation included with BLM's motion for reconsideration demonstrates the untimeliness of Wittner's filing of the Waiver Certifications. The mailing envelope's postmark shows a mailing date of October 8, 2013, and the Waiver Certifications show a receipt date of October 21, 2013—well after the September 1 deadline. Furthermore, Wittner does not argue that the maintenance fees for the 2014 assessment year were paid in a timely manner.

It is well-established that failure to pay maintenance fees or to file the Waiver Certification by the filing deadline is a statutory defect and is not curable. *Chagdud L'hundrub Ling*, 185 IBLA 365, 369 (2015); *Christopher L. Mullikin*, 180 IBLA 60, 76 (2010); *see* 30 U.S.C. § 28i, 28f(d)(1) (2012); 43 C.F.R. § 3830.91(a)(3),

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<sup>2</sup> In *Dugan Production Corp. (On Reconsideration)*, 117 IBLA at 155, the Board did not require an explanation as to why the Minerals Management Service originally failed to provide proof of untimeliness. However, current Board rules require that if a motion for reconsideration cites evidence that was not before the Board at the time of its decision, the movant must explain why the evidence was not provided to the Board during the course of the original appeal. 43 C.F.R. § 4.403(e). In the present matter, BLM has provided such explanation.

3835.92(a), 3835.10(a). Accordingly, the Board cannot excuse a claimant's failure to carry out his/her responsibilities, despite his/her confusion or hardship. *Chagdud L'hundrub Ling*, 185 IBLA at 369; *see also Johnny Smith*, 185 IBLA 254, 255-56 (2015).

Because the record forwarded by BLM to the Board did not include the postmarked envelope and date-stamped Waiver Certifications, we were without a basis for affirming BLM's decisions. However, with its motion for reconsideration, BLM provided those documents along with an explanation for their omission from the case file sent to the Board. This documentation constitutes conclusive evidence that Wittner did not mail the Waiver Certifications in a timely manner. As the Board stated in *Dugan Production (On Reconsideration)*, the failure to include in the record the documents necessary to substantiate BLM's decisions "does not . . . empower the Board to ignore the requirements of statute and regulation, and thereby provide the [claimant] a benefit not authorized by law." 117 IBLA at 155. Accordingly, we grant BLM's motion for reconsideration.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board's opinion in *Leo Wittner*, 185 IBLA 325 (2015), is vacated, and the BLM decisions declaring the subject claims forfeited and void are affirmed. We deny BLM's request for stay as moot.

\_\_\_\_\_/s/  
James F. Roberts  
Administrative Judge

I concur:

\_\_\_\_\_/s/  
Eileen Jones  
Chief Administrative Judge